of the account is in favour of the customer, are bound to pay cheques properly drawn ,and are justified, without any inquiry as to the purpose for which those cheques were drawn, in paying them. But they are under no obligation to honour cheques which exceed the amount of the balance, or, in other words, to allow the customer to overdraw. Bankers generally do accommodate their customers by allowing such overdrafts to some extent; when they do so the legal effect is that they lend the surplus to the customer, and if the person drawing the cheque is authorized to borrow in this way on account of the customers, the bankers can charge the amount against those customers and their principals."

In *Cuthbert* v. *Robarts, Lubbock & Co.*[16] Cozens-Hardy, M.R. said:

"If a customer draws a cheque for a sum in excess of the amount standing to the credit of his current account, it is really a request for a loan, and if the cheque is honoured the customer has borrowed money."

A mere request by the agent to the bank cannot be equated with the actual authority of the agent nor can an agreement by the bank to honour the cheques or to accommodate the defendant be inferred therefrom.

The claim of the plaintiff, however, is based upon the two cheques and not on any implied authority of the deceased to borrow the sums in question or on money had and received to the use of the plaintiff. These two cheques were signed by the deceased *per pro* the defendant and the plaintiff was consequently bound by the actual authority of the deceased which was confined only to the operation of the current account. The plaintiff knew or should have known that in borrowing the amount the deceased was admitting to him that he (the deceased) could not overdraw and had consequently to borrow. If he could not overdraw and yet drew the two cheques he was exceeding the actual authority conferred upon him by the defendant.

The appeal is allowed and the order of the learned president in so far as it relates to the plaintiff's claim is set aside with the result that the plaintiff's claim is dismissed. The appellant will have the costs of this appeal here and in the court below. The order relating to the defendant's counterclaim remains undisturbed.

Appeal allowed.

Solicitors: *Arulanandon & Co.; Yeoh Kian Teik & Co.*

THE NEW INDIA ASSURANCE CO. LTD. v. KARAM SINGH

[A.C.J. (Gill F.J.) April 30, 1972]

[Muar — Civil Appeal No. 1 of 1970]

Practice and Procedure — Absence of plaintiffs and their counsel — Action dismissed — Request for reinstatement denied — Res judicata — Second action — Same parties — Earlier action not been heard and finally determined by the same court — Whether trial court was functus officio.

Insurance — Motor car policy — Recovery of money paid under policy owing to mistake of fact.

The appellants/plaintiffs' claim was for the return of $1,522.67 paid to the respondent/defendant under a mistake of fact on the ground that the respondent made a false and fraudulent claim under a policy of insurance in respect of the respondent's motor car.

The plaintiffs filed an action in the sessions court on June 25, 1967 for the recovery of the said sum, but which action was dismissed as neither the plaintiffs' representative nor their solicitor was present in court on the date of the hearing. On November 25, 1968, the plaintiff's application under O. 19 r. 3(3) of the Subordinate Courts Rules, 1950, for the setting aside of the order of dismissal of the action, was dismissed with costs.

On May 31, 1969, the plaintiffs/appellants commenced the present action in respect of the same subject matter. On August 28, 1969, the learned president ordered that the suit be dismissed with costs on the ground that the court was *functus officio.*

The plaintiffs appealed.

Held, allowing the appeal: (1) the learned president became *functus officio* as regards the earlier action on his refusing the appellants' application for its reinstatement, but he did not become *functus officio* as regards the real dispute between the parties which he never tried;

(2) since the matter substantially in issue between the parties in the earlier action had not been heard and finally determined by the learned president, the plea of *res judicata* was not available to the respondent in the present action;

(3) therefore, the order appealed from must be set aside, and the learned president must hear and determine the action.

Cases referred to:-

(1) *Bedwell* v. *Wood,* (1877) 2 Q.B.D. 626.

(2) *Safety Insurance Co. Ltd.* v. *Hua Seng Electric Co.,* [1968] 1 M.L.J. 273.

(3) *Buga Singh* v. *Koh Bon Keo,* [1967] 1 M.L.J. 16.

(4) *Badat bin Drani* v. *Tan Kheat,* [1953] M.L.J. 67.

(5) *Jenkins* v. *Robertson,* (1867) L.R. 1 H.L. 117.

(6) *Lee Sem Yoong* v. *Leong Yoong,* [1967] 2 M.L.J. 86, 88.

(7) *Chua Wee Seng* v. *Fazal Mohamed,* [1971] 1 M.L.J. 106.

MAGISTRATE'S CIVIL APPEAL.

C. Arul for the appellants.

Atma Singh Gill for the respondent.

Cur. Adv. Vult.

Gill F.J.: Karam Singh, the defendant/respondent, was the owner of a motor vehicle bearing registration No. JB 37. He had his car insured with the New India Assurance Co., Ltd., the plaintiffs/appellants, for the period September 12, 1964 to September 11, 1965. The policy of insurance provided for the plaintiffs to indemnify the defendant, subject to a maximum of $3,000, in respect of any damage to the car arising out of any accident in which it might be involved. One of the terms of the contract of insurance was that

the plaintiff company was not to be liable if at the time of the accident the car was being driven by any person other than the insured or Mohinder Singh or a uniformed driver of the Automobile Association, or by any person whilst under the influence of intoxicating liquor or drugs.

The defendant's car was extensively damaged as a result of it being involved in a road accident on September 13, 1964 at about 7.30 p.m. On his submitting a claim to the plaintiffs on or about December 16, 1964, the defendant was paid a sum of $1,522.67 in respect of such damage.

On June 23, 1966 the plaintiffs wrote to the defendant demanding the return of the said sum of $1,522.67 on the ground that he had made a false and fraudulent claim in that at the time of the accident the car was being driven not by him but by one Hazara Singh, a person to whom no cover was extended under the said policy of insurance, so that payment was made under a mistake of fact, and on the further ground that both Hazara Singh and he, being a passenger in the car, were under the influence of liquor at the material time.

The defendant having failed to pay, the plaintiffs on June 25, 1967 filed an action in the sessions court at Segamat, being Civil Action No. 21 of 1967, for the recovery from him of the said sum of $1,522.67. The action was dismissed as neither the plaintiffs' representatives nor their solicitor was present in court on the date of hearing. On November 25, 1968 the plaintiffs' application under O.19, r.3(3) of the Subordinate Courts Rules, 1950 for the setting aside of the order of dismissal of the action was dismissed with costs on the ground that no good reason had been shown for the plaintiffs' absence on the date of hearing.

Instead of appealing to the High Court against the dismissal of their application for the restoration of their action, the plaintiffs commenced their present action in respect of the same subject matter on May 31, 1969. On June 14, 1969 the defendant made an application that the action be dismissed on the ground that the plaintiffs could not in law maintain their present action based on the same subject matter as in the earlier action. Having heard the application on July 28, 1969, the learned president gave his decision on August 28, 1969, allowing the application and making an order that the suit be dismissed with costs.

It is against that order of August 28, 1969 of the learned president, whereby the second action was dismissed with costs, that the plaintiffs have brought this appeal.

The reasons for the dismissal of the action are stated by the learned president in his grounds of decision as follows: —

"I accept defence contention in the affidavit filed by the defence counsel dated 14th day of June, 1969.

In the absence of specific provisions in the Subordinate Courts Rules I do not wish to rule that principles of *res judicata* does or does not apply in support of my findings.

It is true that there is nothing in the Subordinate Courts Rules specifying that an action or suit dismissed pursuant to the order made under Order 19 rule 3(3) of the Subordinate Courts Rules would enable the defendant to plead defence of *res judicata* as in the case of withdrawal and settlement provided under Order 16, rules (3) and (4).

I am of the view that filing a fresh suit in the same court of the same jurisdiction, subsequent to the order of dismissal made by the learned president under Order 19 rule 3(3) is not a correct procedure or remedy for the plaintiffs in this case."

In the operative part of the formal order, however, the reason stated for the dismissal of the action is that the court was *functus officio*.

The affidavit dated the 14th day of June, 1969, referred to by the learned president in the above passage from his grounds of decision, was the affidavit of the defendant in support of his application for the dismissal of the present (the second) action of the plaintiffs. In that affidavit it was stated, *inter alia*, that the only recourse for the plaintiffs, if any, was to appeal to the High Court under O.39 of the Subordinate Courts Rules, 1950 against the dismissal of their application in the first action, which they had failed to do, knowing fully well that such appeal would have resulted in dismissal with further costs which would have been in the region of $2,000. The affidavit went on to say that, as they had failed to proceed as aforesaid in order to save themselves of the global costs that would have been awarded to the defendant, the plaintiffs' present action was vexatious, harassing, scandalous and an abuse of process. The only observation I need make about those two statements in the affidavit is that there was nothing reprehensible about the plaintiffs' conduct in trying to save themselves from having to pay further costs on an appeal which they must have known was not likely to succeed. It was not for them to oblige the defendant by enriching him with further costs.

It is not clear how the words *functus officio* crept into the order appealed from. *Functus officio* means a person who has discharged his duty, or whose office of authority is at an end (see *Bedwell* v. *Wood*[1]). Thus, once a president has convicted a person charged with an offence before him, he is *functus officio*, and cannot rescind the sentence and re-try the case. Similarly, once he has tried a civil action and made an order on the final determination of the dispute between the parties, he is *functus officio* and cannot rescind his final order and re-try the case, or try a subsequent action between the same parties on the same subject matter. In the present case, the learned president became *functus officio* as regards the earlier action on his refusing the plaintiffs' application for its reinstatement, but he certainly did not become *functus officio* as regards the real dispute between the parties which he never tried, the issue between the parties being whether the plaintiffs were entitled to recover the money which they alleged they had paid to the defendant under a mistake of fact. In other words, he was not *functus officio* as regards that issue between the same parties in the second action. He was therefore wrong in dismissing the action.

The learned president was also wrong in taking the view that filing a fresh suit in the same court of the same jurisdiction subsequent to the order of dismissal of the earlier action under O.19, r.3(3) of the Subordinate Courts Rules, 1950 was not a correct pro-

cedure or remedy for the plaintiffs. He says in support of his finding that he did not wish to rule whether the principle of *res judicata* did or did not apply. With respect, *res judicata* was the only ground on which it was open to him to dismiss the second action, especially when he had directed his mind to a defence by way of *res judicata* to a subsequent action where the earlier action has been withdrawn under Order 16, rule 3 of the Subordinate Courts Rules, 1950.

It would seem clear that in dismissing the action the learned president accepted the argument addressed to him by counsel for the defendant that the only remedy open to the plaintiffs was to appeal to the High Court against the order in the earlier action refusing their application for reinstatement of the action. As the same argument is repeated before this court, it will perhaps be more appropriate to dispose of it before I deal with the arguments by counsel for the appellants in support of this appeal.

In support of this argument counsel for the respondent relies on the cases of *Safety Insurance Company Ltd.* v. *Hua Seng Electric Company*[2] and *Buga Singh* v. *Koh Bon Keo.*[3] With great respect to the learned counsel, neither of those two cases supports any such argument. In the former case judgment was entered against the defendant in default of appearance in court at the trial. His application to have the judgment set aside was refused on the ground that he had shown no good reason for his absence in court on the date of hearing, and his appeal to the High Court against the dismissal of his application was dismissed on the same ground. In the latter case Raja Azlan Shah J. allowed the appeal against an order of the lower court refusing the plaintiff's application for the restoration of his action, after it had been dismissed by reason of his absence in court on the date of hearing, on the ground that justice could be done by compensating the respondent for any costs thrown away. Needless to say, the respondent in the present case was compensated for costs thrown away both when the appellants' earlier action was dismissed and when their application for the restoration of the action was refused.

Counsel for the respondent also relies on the case of *Badat bin Drani* v. *Tan Kheat*[4] in which it was held that, where a party has failed to avail himself of the normal remedy of appealing to the High Court, it is not open to him to go to the High Court for an order of *certiorari*. That case, in my judgment, has no application whatsoever to this appeal, the question here being whether it is open to a plaintiff to bring a second action when his first action in respect of the same subject matter has not been finally adjudicated upon but has been thrown out on some other ground. It is, of course, trite law that if the lower court has made a final order in determining the real dispute between the parties to the action, the only course open to the unsuccessful party would be to appeal to the High Court as *res judicata* would then be a complete defence to any subsequent proceeding in respect of the same dispute.

Counsel for the respondent next relies on sections 33 and 34 of the Courts of Judicature Act, 1964 and section 68 of the Courts Ordinance, 1948. It seems clear to me that they have no relevance whatsoever to this appeal. Sections 33 and 34 of the Courts of Judicature Act, 1964 deal with powers of the High Court on revision of civil proceedings. Section 68 of the Courts Ordinance deals with the prohibition against the splitting of claims. No such questions arise in this appeal.

That brings me to the main argument of counsel for the appellants in support of this appeal, namely, that the appellants were entitled to elect either to appeal against the order in the earlier action or to bring a fresh action, which they did. I accept the argument because it seems clear to me that it was open to the appellants to bring their second action in respect of the same subject matter as in the first action so long as *res judicata* did not apply.

Res judicata signifies that the court has, after argument and consideration, come to a decision on a contested matter (*per* Lord Romilly in *Jenkins* v. *Robertson*[5]). As I said in *Lee Sem Yoong* v. *Leong Yoong*,[6] for the doctrine of *res judicata* to apply, a defendant has to show that there was a former suit between the same parties for the same matter and upon the same cause of action, and also that the matter directly and substantially in issue has been heard and finally decided by the court which heard it. (See also *Chua Wee Seng* v. *Fazal Mohamed*[7]).

It is common ground that the matter substantially in issue between the parties in the earlier action had not been heard and finally determined by the learned president. Thus, the plea of *res judicata* is not available to the defendant in the present action, so that it cannot be said that the plaintiffs cannot in law maintain their present action based on the same subject matter as in the earlier action.

I would allow the appeal with costs, setting aside the order appealed from and directing the learned president to hear and determine the action.

Appeal allowed.

Solicitors: *Shearn, Delamore & Co.; Atma Singh Gill & Co.*